

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4000 of 1996

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CRIMINAL REVISION APPLICATION No 300 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AMRATLAL DEVDANBHAI SONI

Versus

DIRECTOR OF REVENUE INTELLIGENCE

Appearance:

MR B B Naik with Mr KR JANI for Petitioner
Mr M R Ghehani for respondent
Mr K P Raval, APP for the State

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 31/01/97

ORAL JUDGMENT (COMMON)

By way of this common judgment, these two petitions filed by petitioner-Amratlal D Soni - one under section 482 of the Criminal Procedure Code, challenging the order dated 4.2.1996 passed by the Addl.City Sessions

Judge, Court No.14, Ahmedabad, in exercise of powers under section 319 of the Code of Criminal Procedure at the instance of Dr.Bipin Panchal, accused No.2, issued non-bailable warrant with a view to proceed against him for offence under sections 22 and 29 of the Narcotic Drugs Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act of 1985') read with Section 120-B of the I.P.C. in Sessions Case No.162/94 and another Revision Application under section 397 of the Cr.P.C. challenging the order passed on the same day i.e. on 4.1.1996 framing charges against the petitioner for the said offences along with other accused persons, are disposed of.

2. The relevant facts are that Dy.Director of Revenue Intelligence, Ahmedabad filed a complaint on 23.5.1994 in the competent court against seven accused persons namely; A-1, Achit Patel alias Mahesh Shah, A-2, Dr.Bipin Panchal, A-3, Arvind S Soni, A-4, Prahlad M Patel, A-5, Revabhai K Patel, A-6, Kashyap Patel and A-7, Piyushbhai Pandya. It is alleged that on 4.11.1993, at Bombay Airport 162 kg. Mandrex Tablets were found which were meant for export at Kenya. On inquiry, it was found that it was dispatched by one Advance Exports of Ahmedabad. On further inquiry by department of Directorate of Revenue Intelligence (for short 'D.R.I.'), it revealed that Achit Patel alias Mahesh Shah was the concerned person for the said exports and he had signed certain documents of exports. The investigation also revealed the complicity of accused No.2 Dr. Bipin Panchal in the crime. On 13/14.1.1994, 166.740 kgs. Mandrex tablets were found near Vasan village in connection of which Mr Arvind Shivilal Soni, accused No.3 was apprehended and during the course of statements recorded on 13/14.1.1997 to 16.1.1994, a huge quantity of Mantrex weighing 1666.5 kgs. was found from the godown situated at village Gota. As the complicity of the other persons were also found, they were arrested. After investigation, on 23.5.94, the Department filed a complaint against 7 accused persons in the concerned court.

3. On 24.7.1995, the accused No.2, Dr.Bipin Panchal filed application before the learned City Sessions Judge, Ahmedabad, stating, inter alia, that the prosecution is seeking to rely upon his statements as well as original accused No.1 i.e. Achit Patel and from their statements, it transpires that one Anirudhdhsingh Jadeja of Kutch, Amratlal and his son of Bimal Soni had also participated in the alleged conspiracy. The applicant also referred to the statements of the said persons allegedly recorded

under section 67 of the NDPS Act, wherein they had admitted their guilt. It was also stated that the accused No.1 had identified Amratlal Soni alias Mamaji from the photograph shown to him during his statement. It was thus, prayed that the Court, in exercise of powers under section 319 may add the said three persons as accused and put them to trial. The learned Judge, by a detailed order, prima facie, found complicity of petitioner Amratlal Soni alias Mamaji and Aniruddhsingh Jadeja in the crime, and as such, by the impugned order, issued a non-bailable warrant for their presence and to face trial for offences under sections 22 and 29 of the Act of 1985 read with section 120-B of I.P.C. However, the learned Judge refused the prayer with respect to Bimal Soni. On the same day, the trial court also framed charges against all the accused persons including the petitioner and Aniruddhsingh Jadeja for offences under section 22 and 29 of the Act of 1985 read with 120-B of I.P.C. The petitioner being aggrieved by the aforesaid two orders dated 4.1.1996, has approached this Court by way of application under section 482 and Revision Application under section 397 of the Cr. P.C.

4. It is contended by Mr B B Naik, learned Advocate for the applicant that the learned Trial Judge has committed error of jurisdiction in exercising power under section 319 of the Code without evidence being recorded during the trial. He placed reliance on a decision of the Apex Court Rajkishore Prasad v. State of Bihar, reported in 1996 (4) SCC 495. He further submits that the material on which the learned Judge placed reliance is inadmissible in evidence, inasmuch as statement of the co-accused cannot be used against him. He placed reliance on a decision in the case of Superintendent of Customs vs. Banabhai K Patel & Anr., reported in AIR 1992 SC 1582. On the other hand, Mr M R Gehani, learned Advocate appearing for the Department submits that the power under section 319 of the Code can be invoked during enquiry or trial and it is not necessary to wait till the evidence is recorded during the trial.. He further submits that the learned Judge on the basis of sufficient material on record and prima facie being satisfied of the complicity of the petitioner in the alleged crime, passed the impugned order which calls for no interference by this court in exercise of powers under section 482 of the Code. It is also argued that in view of section 10 of the Evidence Act, on a charge of conspiracy, evidence and statement of co-conspirators in pursuance of the conspiracy can be taken into account.

5. I have given thoughtful consideration to the

rival contentions raised by the learned counsel. Section 319 of the Code confers powers upon the Criminal Court to add a person who is not an accused before it and against whom there is evidence of involvement in the offence, as an accused tried him along with those who are being tried. Section 319 reads as under:

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then -

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard,

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

In the case of *Kishun Singh v. State of Bihar*, reported in 1993 (2) SCC 16, the Apex Court held that on committal under section 209, the Sessions Judge would be justified in summoning without recording evidence, the persons not named in police report under section 173 to stand trial along with those already named therein. In the said case, the question was whether the Court of Sessions to which an accused has committed for trial by the Magistrate can without recording evidence, summon a

person not named in the police report presented under section 173 of the Code to stand trial along with those already named therein, in exercise of powers conferred under section 319 of the Code. It was contended in the said case that unless evidence was recorded during the course of trial, the Sessions Judge has no jurisdiction under section 319 of the Code to take cognizance and implead the appellants as co-accused solely on the basis of the material collected in the course of investigation and appended to the report forwarded under section 173 of the Code in view of the clear mandate of section 193 of the code. Section 193 provides that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code. The Apex Court held that on a plain reading of section 193 shows that once the case is committed to the Sessions Court by the Magistrate under section 209, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record.

6. In the case of Nisar v. State of U.P., reported in 1995 (2) SCC 23, the Court held that the power under section 319(1) can be exercised only in those cases where involvement of persons other than those arraigned in the charge-sheet comes to light in the course of evidence recorded during the enquiry or trial. On the facts of the case, the Court held that as that stage had not yet reached. the appellants could not have been summoned invoking section 319 of the Code. A contention was raised that section 319 of the Code can be invoked only at the stage when evidence was led and that stage had not yet reached. The said contention was rejected relying on the decision in the case of Kishan Singh (supra). Again the question came up for consideration before the Apex Court in Raj Kishore Prasad's case (supra) as to whether the Magistrate undertaking commitment under section 209 of the Code of a case triable by a Court of Sessions to associate another person as accused, in exercise of power under section 319 of the Code or under any other provisions. The court expressed its reservation to the view expressed in Kishun Singh's case (supra), as approved in Nisar's case. In para 15, the Court said,

"Having thus expressed our doubts we do not, as at present advised, take the matter any further because the fact situation of the present case does not warrant its resolution, a dire necessity." In view of the aforesaid, the binding precedent on the controversy raised is the ratio laid down in Kishun Singh's case (supra) that a Court of sessions has power under section 319 to summon a person without recording evidence in case the embargo of commitment is lifted. In a case under the NDPS Act, there is no committal proceedings in view of section 36-A(c) and as such there being no embargo of commitment, the powers under section 319 can be exercised by the Special or Sessions Court, even without evidence being recorded during trial.

7. Section 36 of the NDPS Act provides for constitution of Special Courts. Sub-section (1) of section 36 provides that the Government may, for the purpose of providing speedy trial of the offences under this Act, by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such areas as may be specified in the Notification. Section 36 A provides that all offences under the Act shall triable only by the Special Court constituted under the Act may be specified in this behalf by the Government. Section 36-A reads as under:

"36-A. Offences triable by Special Courts - (1)
Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) all offences under this Act, shall be triable
only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) Where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers -

- (i) when such person is forwarded to him as aforesaid; or
- (ii) upon or at any time before the expiry of the period of detention authorised by him,

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36."

Sub-clause (c) of section 36-A empowers the Special Court to exercise powers of the Magistrate under section 167 of the Code in relation to an accused person in such cases who has been forwarded to him under that section. Sub-section (d) dispense with the requirement of committal procedures. The provision empowers the Special

Court to take cognizance of offence without the accused being committed to it for trial. Thus, in a case of N.D.P.S. Act, there being no committal proceedings, once the 'cognizance' is taken on filing the complaint, the only stage is of section 225 and 226 and the trial begins from that stage. Stage of discharge or framing of charge under section 227 and section 228 comes next. In the instant case, powers under section 319 has been exercised just before framing charge i.e. at the stage of trial. Thus the first contention deserves to be rejected.

8. It is next contended by Mr Naik that the learned trial Judge has committed error in placing reliance on inadmissible evidence. He submits that the statement of accused cannot be used against the co-accused. This contention has been rejected by the learned Judge on the ground that the provisions of section 67 of the NDPS Act, have overriding effect over the provisions contained in the Code of Criminal Procedures. In the opinion of the learned Judge, the Court can even convict an accused on the statement of the co-accused if it is found to be trustworthy. It is not necessary to go into this controversy as the term 'evidence' employed in section 319 of the Code does not necessarily mean only such evidence which constitutes legal and admissible evidence at the trial. It includes evidence collected during investigation, the documents relied on for the purpose of takinga cognizance and then at the stage of trial to prove the guilt of the accused.

9. It is next contended that even if the statement of the accused persons are read for the limited purpose of adding accused under section 319, then also even on a plain reading of the statement of the accused No.1 and 2, there is nothing to connect the applicant with the crime. Involvement of the applicant is evident from the statement of accused No.1-Achit N Patel. It is stated by accused Achit N Patel in para 4 that Aniruddhsinh Jadeja is the person who was behind all the affairs. In fact, the consignment was transported by him with all the details and address whereby unloading of the consignment was also taken. There is also evidence that the applicant-Amratlal Soni known as Mamaji was introduced to Achit Patel. The photograph of Amratlal Soni was shown to accused No.1 and he identified him. There is also evidence that applicant-Amratlal Soni had given an amount of Rs.2,50,000/- to accused No.2 - Dr. Bipin Panchal for production of Mantrax tablets. It may also be stated that the allegation against the petitioner is that of a conspirator. The Apex Court in Bhagwandas vs. State of

Rajasthan, reported in AIR 1974 SC 893, observes thus-

"In cases of conspiracy better evidence than acts
and statements of co-conspirators in pursuance of
the conspiracy is hardly ever available".

In view of it, I am not inclined to interfere in exercise
of power under section 482, with the impugned order
passed by the learned Judge, adding the accused to face
trial, being prima facie satisfied of petitioners
complicity in the crime.

10. So far as the Criminal Revision No.300/96 is
concerned, the learned Judge, after passing order under
section 319 has framed charges against the petitioner.
Thus, the reason for which I uphold the order calling the
accused by issuing non-bailable warrant, holds good to
say that there is prima facie evidence against the
applicant to frame the charge. In view of this, there is
no merit in the Revision Application No.300/96 as well.

11. In view of the aforesaid, both the applications
are rejected. Rule discharged.

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